SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

MRS. LESLIE F. SLADE, ET AL.,
Petitioners,

vs.

SHELL OIL COMPANY, INC., ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

(1) There was no opinion in the District Court, but a charge to the jury appears (R. 531). The opinion of the Court of Appeals appears (R. 600), 133 Fed. (2d) 518, and a copy is made Appendix "D" hereto, for the Court's convenience.

II.

Jurisdiction.

1.

The date of the judgment to be reviewed is, entered February 2, 1943, originally; Petition for Rehearing filed and denied March 12, 1943 (R. 622).

2.

Petitioners advance these specific claims:

The majority opinion of the Court of Appeals is erroneous in the following particulars:

1. It disregards, without citation, controlling Louisiana statutes and decisions.

2. It violates Article VII, Amendments, Constitution of the United States, as to jury trials.

3. As affirmatively appears from this opinion, in the Fifth Circuit, it disregards "weight and credibility", and sets up in the Fifth Circuit a right of judicial review as to contributory negligence not elsewhere obtaining.

4. It wrongfully precludes, under Rule 8, plaintiff from having a recovery for death caused by an absolute nuisance, by assuming to discharge the defendant on the ground of decedent's contributory negligence. Contributory negligence is not a defense to such a cause of action.

5. It vacates a verdict finding complete compliance with the Interstate Commerce Commission's Safety Rules for trucks moving in interstate commerce and assumes to reverse in virtue of a rule of law promulgated by the State of Louisiana, wherein the death occurred, thereby excluding the rules of the I. C. C. from their proper operation.

3.

Jurisdiction is invoked under *Judicial Code*, Section 240, as amended by Act of February 13, 1925, 43 Stat. 938, Section 347, 28 *U. S. C. A.*

4.

Jurisdiction is sustained by *Illinois C. R. Co.* v. *Moore*, 312 U. S. 630, 85 L. ed. 1089; *Conway* v. *O'Brien*, 61 S. Ct.

634, 312 U. S. 492, 85 L. ed. 969; *Tiller* v. *Atlantic Coast L. R. Co.*, 63 S. Ct. 444, 87 L. ed. 453, reversing Fifth Circuit, 128 F. (2d) 420.

III.

Statement of the Case.

Reference is respectfully made to "Summary Statement of Matters Involved", *supra*, in the Petition for Certiorari. Supplemental statements will be made in the argument. For the Court's information, copies of the briefs filed in the Court of Appeals are made available herewith.

IV.

Specifications of Error.

Specification No. 1.

The Court of Appeals decided, as to contributory negligence of Slade, in a manner in palpable conflict with controlling Louisiana statutes and decisions, which were not cited, and whereunder the jury verdict, as rendered, was conclusive of the non-existence of contributory negligence.

Specification No. 2.

The Court of Appeals likewise disregarded directly applicable decisions of the State of Louisiana and decided this cause in a way not in conformity thereto in the following particulars:

(a) In disregarding the burden of proof as to contributory negligence;

(b) Disregarding the presumption of due care created by Louisiana law;

(c) Accepting as binding upon petitioners an alleged estimate assumed to be made by those who were so sitused

and circumstanced as to the oncoming truck as to be, under Louisiana law, unable to give an opinion entitled to weight thereunder;

(d) In disregarding the jury's finding of due care as to speed when it affirmatively was shown by the witness Arnold that it was not in "excess of ten miles per hour." (R. 181, 182).

(e) Further principles of Louisiana law whereunder in each particular case the facts are to be separately reviewed and no general rule announced.

Specification No. 3.

There was the establishment by this opinion in the Fifth Circuit of an erroneous rule, conflicting with rules obtaining in this Court and in the other Circuits, when the Court of Appeals in this cause in the Fifth Circuit, by declaring that certain alleged facts were "without substantial conflict", reversed a jury verdict, when the verdict, as from the opinion affirmatively appeared, was based upon adequate credible evidence.

Specification No. 4

The Court of Appeals erred in precluding plaintiff's right to recover from defendant for absolute nuisance and wilful injury properly pleaded and proved, when plaintiff, having been accorded a recovery for creation and maintenance of the impenetrable fog on the public highway, did not appeal from direction of a verdict on a Second Count predicating liability upon nuisance, that is, the creation and maintenance of the fog, when the jury, the District Judge and the Court of Appeals all concede the defendant's fog to be herein the efficient cause of Slade's death. Under Rule 8, on remand, defendant cannot escape liability on ground

of alleged contributory negligence for this is not a defense to the wrong wrought by defendant.

Specification No. 5

Where a driver of a motor truck, engaged in interstate commerce, has fully complied with Interstate Commerce Safety Rules and not thereunder been guilty of contributory negligence under a jury verdict, the state in which the death happened may not prescribe a rule of law as to contributory negligence which will defeat an action for wrongful death, the rules prescribed by the Interstate Commerce Commission being the supreme law of the land and exclusive of state authority.

V.

ARGUMENT.

Point 1.

When the majority opinion of the Court of Appeals assumed to establish Slade's contributory negligence as a matter of law (citing therefor certain cases[1]), in moving too fast when he struck the overturned truck, by reason of defendant's fog not seeing same in time to avoid the collision (assuming contributory negligence to constitute a defense, which is not the case where there is a breach of an absolute duty, Point II, infra), that court, contrary to Ilinois C. R. Co. v. Moore, 312 U. S. 630, 85 L. Ed. 1089 and Erie R. Co. v. Tompkins, 304 U. S. 64, directly disregarded, without reference, the controlling decision (Gaiennie v. Cooperative Produce Company, 196 La. 417, 199 So. 377, 610, Appendix "B", infra) in the Supreme Court of Louisiana, the highest court in that State, whereunder, in proper

cases, the jury could find, as it did here, notwithstanding the collision, that plaintiff was free from contributory negligence.

1. The Federal Court must apply the Louisiana statute, as construed by its Supreme Court. Compare *Illinois C. R. Co.* v. *Moore*, 312 U. S. 630, 85 L. ed. 1089, wherein the Fifth Circuit, with the same Judge dissenting, misapplied a Mississippi statute, as construed by Mississippi's Supreme Court, disregarding that therein held (5 Cir., 112 Fed. 2d 959); *Tiller* v. *Atl. C. L. R. Co.*, 63 S. Ct. 444, 87 L. ed. 453, likewise reversing the Fifth Circuit, 128 Fed. 2d 420; *Conway* v. *O'Brien*, 312 U. S. 492, 85 L. ed. 969; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

2. The jury, the District Judge and the Court of Appeals each found defendant in fault by creating and maintaining the fog. The liability therefrom might arise by reason of (a) negligence; (b) absolute nuisance, 39 *Am. Juris.*, 475; Judge Cardozo in *McFarlane* v. *Niagara Falls*, 247 N. Y. 347-8, 160 N. E. 393, 57 A. L. R. 1; *Hoffman* v. *Bristol*, 113 Conn. 386, 155 Atl. 499, 75 A. L. R. 1191; and (c) possible wilful or wanton negligence. *Evens* v. *Texas, etc., R. Co.*, 5th Cir., 134 Fed. 2d 275.

But, assuming contributory negligence to be a defense, for argument sake, then,

3. The Court of Appeals disregarded controlling Louisiana authority.

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[1] *O'Rourke* v. *McConaughey*, (Ct. App., Orleans), 157 So. 598; *Dominick* v. *Haynes Bros.*, (Ct. App., 2d Cir.), 127 So. 31, 32; *Raziano* v. *Trauth*, (Ct. App., Orleans), 131 So. 212; *Rector* v. *Allied Van Lines*, (Ct. App., 2d Cir.), 198 So. 516; *Magvio* v. *Bradford Motor Exp.*, (Ct. App., Orleans), 171 So. 859; *Inman* v. *Silver Fleet*, (Ct. App., 1st Cir.), 175 So. 436; *Hutchinson* v. *James*, (Ct. App., Orleans), 160 So. 447; *Penton* v. *Sears*, (Ct. App., 1st Cir.), 4 So. 2d 547; *Russo* v. *Aucoin*, (Ct. App., 1st Cir.), 7 So. 2d 744; *Castille* v. *Richard*, 157 La. 274, 102 So. 398, 37 A. L. R. 586.

(a) *Statutes.*

By Act No. 286 of 1938, Title II, Rule 4, Laws Relating to Motor Vehicles and Their Operation on the Streets and Highways of Louisiana, it was made——

> "Unlawful for any person to drive or operate any motor or other vehicle upon the public roads, highways and bridges of this State at other than a careful, prudent, reasonable and proper speed, having due regard to the traffic, surface and width of the highways, the location and neighborhood, and any other conditions or circumstances then existing, and no person shall, under any circumstances or conditions, drive any vehicle upon the public roads, highways or bridges of this State, at such speed as will endanger the life, limb or property of any other person * * *."

(b) *Decisions.*

The Court of Appeals assumed to hold as a matter of law that Slade's alleged failure to see (he was dead and did not testify), and his collision with the overturned truck, approximately of the same color as the ground about it, exculpated defendant, whose negligence had been found by the jury to consist in the creation of an impenetrable fog, which at that point human eye could not pierce, constituting an absolute nuisance. Circuit Judge Hutcheson assumed to follow those cases from the inferior courts of appeal in Louisiana cited in the margin, which can be easily differentiated in most cases, but which, when they cannot so be, will be disregarded under the later decision of the Supreme Court.

Initially, the Court of Appeals had held the question in each case of a failure thus to see and stop as one wherefore due care might be shown by giving a reasonable excuse.

Compare *Futch* v. *Addison et al.*, 12 La. App. 535, 126 So. 590; *Stafford* v. *Nelson Bros.*, 15 La. App. 51, 130 So.

234, 235; *Hanno* v. *Motor Freight Lines, Inc.*, 17 La. App. 62, 134 So. 317, 318.

Later, the Courts of Appeal deviated more or less from the rule just quoted and continued thus until *Gaiennie* v. *Co-operative Produce Co.*, 196 La. 417, 199 So. 610, where there was a parked truck on a through highway and a collision therewith by Gaiennie. The Court of Appeals found the parking gross negligence, but being in doubt as to the contributory negligence on the part of Gaiennie, (who was acting, by presumption, at least, precisely as Slade had acted), the First Circuit certified that case to the Supreme Court, where decision was had, 196 La. 417, 199 So. 377, with a rehearing denied. *Castille* v. *Richard* (Sup. Ct. La.), 157 La. 274, 102 So. 398 is not in any way in conflict.

The facts in the *Gaiennie Case*, as to the alleged contributory negligence in not seeing and stopping are thus stated (199 Sou. 612):

> "Therefore, to traffic coming from the west, this truck, parked on a portion of the paved slab of the highway in the dark, was an object of peril placed and permitted to remain there through the negligence of Monte, who, it is admitted, was acting within the scope of his employment.
>
> "Within a period of time which is not fixed, but which we estimate to be several minutes, during which Monte, the driver of this truck, occupied himself in a rather indefinite manner, as far as his testimony shows, in looking for flares in the truck, Charles S. Gaiennie, the plaintiff herein, approached the truck from the west in a Chevrolet coach belonging to his employer and which he was driving at a rate of speed estimated to be from 35 to 40 miles per hour. He kept his car in the south lane of travel on the paved portion of the highway which was to his right, and as he neared the point where the truck was parked he began meeting cars going west or in the opposite direction to that in which he was traveling. There were four or five cars

following each other and all of them with the headlights burning so brightly as to dazzle his eyesight intermittently. He dimmed the headlights on his car and slowed down its speed to between 20 and 25 miles per hour.

"The effect of the dazzling lights from the cars he was meeting was that he was not blinded by them but his vision was momentarily and intermittently impaired to the extent that instead of having a full view of the paved highway ahead of him as he had without such impairment, his view of the pavement was limited to approximately 18 or 20 ft. within which distance he could, at the speed he was going, bring his car to a stop. As he had dimmed the headlights on his car, that had the effect of tilting the beam of light downward at an acute angle on the pavement in front of him, this also causing some restriction in his sight of the pavement as far as distance was concerned.

"Plaintiff felt safe in proceeding on the highway under the circumstances, and he did. As he passed the last of the series of cars whose dazzling headlights caused momentary impairment to his ordinary vision, his car, in the meantime covering such distance as its speed carried it, he found himself confronted with the truck parked on the highway without any sign or warning of its presence, some eight or ten feet ahead of him. The rear body of the truck was some 3 or 4 feet above the ground and extended back some four feet over the rear wheels, so that when plaintiff dimmed his lights the tilted beam of his headlights projected under the truck making it that much more difficult for him to see it."

Whereupon, the Supreme Court, in a unanimous opinion, held:

"The burden of proof is on the defendant to show that the plaintiff was negligent and that his negligence contributed to his injury. Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270; Washington & Georgetown R. Co. *v.* Harmon's Adm'r,

147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284. This doctrine was approved in Loprestie *v.* Roy Motors, Inc. et al., 191 La. 239, 185 So. 11.

"In the case of Woodley & Collins *v.* Schusters' Wholesale Produce Co., Inc., 170 La. 527, 128 So. 469, in discussing whether or not the driver of an automobile should be deemed negligent for failing to slow down, we stated that it depended on the circumstances of the particular case, and that it is not easy, nor safe, to lay down a hard and fast rule on the subject. The difficulty in laying down a hard and fast rule is that the act provides that the conditions and circumstances must be considered as well as the traffic, surface and width of the highway, and the location of the neighborhood. Such being the case, the particular facts of each case must be considered in arriving at a conclusion, and it would not be safe to lay down a hard and fast rule for that reason.

"In the case of Louisiana Power & Light Co. *v.* Saia et al., La. App., 173 So. 537, the court stated in effect that a great many cases have held that the failure of the driver of a moving vehicle to observe an obstruction—usually in the form of a stationary vehicle—constituted such negligence as would prevent recovery, and cited many cases to that effect; but, the court aptly said in effect that this result had not been reached regardless of surrounding circumstances and facts. In fact, the courts have been careful to say in each case that no circumstances were involved that would justify the failure of the driver to see the object ahead. It would appear that this is a reasonable interpretation of the provision of Act No. 21 of 1932, aforementioned, because it specifically provides that the conditions and circumstances must be considered. While the general rule makes it the duty of the driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead, yet it has been well recognized that this rule has exceptions and modifications. Jacobs *v.* Jacobs, 141 La. 272, 74 So. 992, L. R. A. 1917F, 253.

"In Kirk *v.* United Gas Public Service Co., 185 La. 580, 170 So. 1, this court stated that the general rule is not inflexible, and that its application depends on the facts and circumstances of each case. Many cases were cited therein where the rule was relaxed and the driver of the automobile exonerated from negligence.

"Many cases have held to the effect that ordinarily a motorist is negligent in not slowing down to a speed at which he can stop instantly when blinded by headlights. However, a careful examination will reveal that the circumstances and facts of each case were taken into consideration in arriving at a conclusion. Also, it has been held in many cases that a motorist was guilty of negligence because he failed to see the obstruction or object in time to stop before colliding with it; but, the facts and circumstances of each case have been considered in determining whether or not the motorist had sufficient reasons for not seeing the object or obstruction in time to stop.

"In the case of Moncrief *v.* Ober, 3 La. App. 660, it was held that a small cable stretched above the surface of a public road was such an unusual obstruction that the failure of a motorist to detect it did not indicate negligence on his part.

"In the case of Kirk *v.* United Gas Public Service Co., supra, wherein a motorist saw an object ahead of him in the road which he thought was a shadow or repaired patch in the road and did not observe that it was a dead yearling until a moment before it was struck, when it was too late to stop, we arrived at the conclusion that it would be unreasonable to hold the motorist negligent in failing to see the yearling sooner than he did.

"From the facts certified it appears that the plaintiff was driving at a moderate rate of speed, between 40 or 45 miles an hour, on an open highway, with his car properly lighted, and that he slowed down to between 20 and 25 miles an hour on meeting the approaching cars. There is nothing to indicate that the neighbor-

hood within the vicinity was thickly populated. There is nothing in the facts to indicate that the location was such that the plaintiff would expect cars to be parked on the highway, as would be expected where the location was thickly populated. It appears that the plaintiff was travelling at such a speed, after he slowed down, to enable him to meet an ordinary emergency under the circumstances. If the truck had been parked entirely on the pavement the plaintiff could more easily have seen the wheels and running gear, but the truck was parked at an angle on the edge of the highway with the body extended out into the road some three or four feet above the ground, and some four feet beyond the rear wheels. It was the duty of the plaintiff when meeting the approaching cars to dim his lights. When he dimmed the lights the beam was necessarily thrown down on the highway, causing it to shine under the rear end of the truck, which was protruding some distance over the road. Under these circumstances, we do not think the plaintiff was negligent in failing to see the truck sooner than he did.

"For the reasons set out above, our answer to the first question is that we cannot lay down a hard and fast rule to govern in these types of cases because so much depends upon the circumstances of each particular case.

"Our answer to question two is that under the facts outlined the plaintiff was not guilty of contributory negligence."

And thus answered that Gaiennie, so driving, was not guilty of contributory negligence, and the case for Slade is much stronger, as shown infra.

The Court of Appeals made no reference whatever to this decision.

(c) *The judicial history of the Gaiennie Case in Louisiana.*

This case was followed in:

(1) *McCook* v. *Rebecca-Fabacher, Inc.* (Ct. App., 1st Cir.), 10 So. 2d 512, whereasto it was said:

> "Counsel for the plaintiff stress the case of Gaiennie *v.* Cooperative Produce Co., Inc., 196 La. 417, 199 So. 377, as authority in favor of their client. As a legal proposition that case is authority only to the extent that the contributory negligence of a driver who runs into the rear end of an unlighted truck parked on the highway at night presents a question of fact which has to be determined on the evidence produced in each particular case."

It will be noted that it was the 1st Circuit, Court of Appeals, which first established clearly that such matters were for the jury, and later, more or less, therefrom deviated until put back in line.

(2) *Babington* v. *Burris* (Ct. App., 1st Cir.), 7 So. 2d 650-653, likewise applied and followed it.

(3) In *Arceneaux* v. *Louisiana Highway Com.* (Ct. App., Orleans), 5 So. 2d 20, 22, that Court said:

> "The allegation that the defect was an obstruction beneath the surface of the highway has also been misconstrued. All that this means is that it was a hole and not an obstruction raised above the surface. The latter may easily be seen—the former only with difficulty, if at all. In making the allegation that the defect was an obstruction 'beneath' the surface, counsel, no doubt, were mindful of our language in German *v.* City of New Orleans, La. App., 3 So. 2d 181, 182, wherein we said: '* * * We have always recognized the distinction between striking an obstruction extending above the surface of the highway, which obstruction should be illuminated by headlights, and the running into a hole or depression in the road against which the lights did

> not shine and which might be no more noticeable than a shadow on the surface of the road. (Citing the Gaiennie and other cases).' "

We stress the color (yellow—R. 95) of the overturned truck, and its invisibility thereby (R. 102), being the equivalent of a depression under the Louisiana decisions, and that it was only 5½ feet high when lying on its side and the fog to this height was much denser (R. 103). There are so many theories of what might or might not be as to make this preeminently a jury question.

(4) In *Warnick* v. *Louisiana Highway Com.* (Ct. App., 1st Cir.), 4 So. 2d 607, 613, it is said:

> "The evidence shows that this truck had been used just prior to the day of the accident in the hauling of clay, dirt and gravel; though its original color was orange, on the night of the accident, due to its usage, it was a dull color and difficult to see at night. The back wheels of the truck recessed in from the body about 18 inches and the floor of the body was 4 feet from the ground, thus making it difficult for the lights of an automobile to disclose it before it was right on it, especially where the lights were dimmed in order to pass an on-coming car, as Ledet says was done in this case, which dimming had the effect of projecting the beam of the lights under the body of the truck. The color of the truck, according to the testimony vaguely blended with the pavement, and made it even more difficult for Ledet, in his approach, to discern it. The on-coming car also had some effect on Ledet's driving, impairing his vision momentarily. To take care of this impairment, Ledet says that he released his foot free from the accelerator, which no doubt had the effect of slowing down his speed."

Note, particularly, that the color of the overturned trailer, if it were visible, presented a similar problem.

(5) In *German* v. *City of New Orleans* (Ct. App., Orleans), 3 So. 2d 181, 182, that Court followed the rule whereon we rely, stating:

> "In Jacobs *v.* Jacobs, 141 La. 272, 74 So. 992, L. R. A. 1917F, 253, the Supreme Court held free from negligence an automobile operator who drove it into a canal under almost identical circumstances.
>
> "Counsel for defendant cites several cases in which it has been held that the driver of an automobile is negligent when he operates it at such speed as to render it impossible that it be stopped within the distance illuminated by its headlights. But this rule is not without exception, and it has never been held that under no circumstances may an automobile owner recover for damage sustained by his car if it appears that the operator could have stopped before striking an obstruction, or before running into a hole in the roadway. All of the surrounding circumstances must be investigated, and from them it can be determined whether the failure of the driver to stop constituted negligence on his part."

(d) *Further decisions.*

(1) *Peart* v. *Orleans-Kenner Traction Co.* (Ct. App., Orleans), 123 So., 822, 823, wherein there was a grade crossing accident, whereasto the Court of Appeals said:

> "A heavy fog prevailed. Fog constitutes the greatest menace of transportation, whether upon land or sea, and is the most feared of all perils that confronted the traveler. The 'pea soup' fogs of London are notorious for causing confusion and disaster in connection with pedestrian and vehicular traffic. Science, which in so many instances has relieved, or allayed, or mitigated the difficulties which beset, and ills which afflict, mankind, seems helpless and hopeless in this particular, and has contributed nothing with which to combat this terror of transportation. To one who has been at sea, as has the writer, during the prevalence of

> a dense fog for some 48 hours, and observed the anxious expression of the navigator, his ceaseless vigil upon the bridge of the ship, the constant blasts upon the primitive fog horn, the sole protection relied upon, and has witnessed the depression of the passengers and crew, no further demonstration of the danger of fog is necessary."

The Court then cited *The Martello,* 153 U. S. 64, and held the Traction Company responsible and the plaintiff, in driving on the track, not guilty of contributory negligence, saying:

> "It is contended that he either saw or should have seen, heard, or should have heard the electric car. To suppose that he saw or heard and continued on his way is to assume an intention to suicide or a state of imbecility. As to whether he should have seen or heard, and therefore his failure to do so was equivalent to not looking or listening under familiar principles of law, we observe that this rule has no application when surrounding circumstances excuse or prevent his failure to see or hear. Huddy on Automobiles (8th Ed.) Sec. 716; Loftus *v.* Pacific Electric Co., 166 Cal. 464, 137 P. 34.
>
> " 'If the driver of the hearse stopped, looked and listened when he reached the crossing and before going upon the first track, as he testified, and did not see, and could not see, any approaching train, and did not hear, and could not have heard, any signal or noise of a moving train, we are unable to see how the driver could be legally charged with contributory negligence.' " Betz *v.* I. C. R. R., 161 La. 929, 109 So. 766, 767. See, also, Townsend *v.* Mo. Pac. R. Co., 163 La. 872, 113 So. 130, 54 A. L. R. 538."

Visualize the defendant produced the fog wherein Slade could not see. Respondent, having blinded Slade, could not take advantage of his own wrong. Do not misconceive—plaintiff's contention is as hereinafter shown, that Slade

exercised due care, both (a) presumptively, (Point II, infra), and (b) in fact.

Strangely, the *Peart Case* is applied and followed in *O'Rourke* v. *McConaughey* (Ct. App., Orleans), 157 So. 598, 605, 606, and was utilized by the Court of Appeals, with deference, contrary to the later Supreme Court decision in the *Gaiennie Case,* to preclude recovery on the part of one who had run into a parked automobile, but not even the *O'Rourke Case* would pretend that where Shell Oil Company had blinded Slade, that the same corporation might attribute Slade's imposed blindness as his fault.

(2) *Wilson* v. *Great Sou. Tel. & Tel. Co.,* 41 La. Ann. 1041, 6 So. 781.

(3) *Woodley & Collins* v. *Schusters' Wholesale Produce Co.,* 170 La. 527, 128 So. 469.

(4) *Louisiana Power & L. Co.* v. *Saia, et al.* (Ct. App. La., Orleans), 173 So. 537.

(5) *Jacobs* v. *Jacobs,* 141 La. 272, 74 So. 992, L. R. A. 1917F, 253.

(6) *Kirk* v. *United Gas Pub. Ser. Co.,* 185 La. 580, 170 So. 1.

(7) *Moncrief* v. *Ober,* 3 La. App. 660, wherein failure to see an unusual obstruction was held not to be contributory negligence.

(8) *Futch* v. *Addison et al.,* 12 La. App. 535, 126 So. 590.

(9) *Stafford* v. *Nelson Bros.,* 15 La. App. 51, 130 So. 234, 235.

(10) *Hanno* v. *Motor Freight Lines, Inc.,* 17 La. App. 62, 134 So. 317.

(11) *Castille* v. *Richard,* 157 La. 274, 102 So. 398, 37 A. L. R. 586.

(e) *Decisions of the Court of Appeals assumed to be relied on will be found not controlling.*

We have relegated the further distinguishing features to Appendix "E", whereto, if the Court be therein interested, reference is respectfully made.

(f) *The charge to the jury.*

This appears (R. 531). Respondents obtained about twenty charges, stating the alleged contributory negligence from every possible angle, and the jury found, as a question of fact, against each contention, which was, under the well-settled doctrine of the Supreme Court of Louisiana, proper, for defendant having created the fog wherein Slade could not see, and then invited trucks to turn to the left into its plant, coming from the East, as was the L. & A. truck, when thus invisible, thus wrought the wrong and Slade was free from contributory negligence as shown infra.

The Court said:

> "While the evidence was conflicting as to whether the heavy fog which admittedly was present was caused * * * by the defendant's discharge * * * into the highway canal, there was sufficient evidence to support the verdict of the jury that it was."

(g) *The burden of proof, presumptions and facts.*

(1) Burden of proof.

Having thus been guilty of negligence, the burden of proof as to contributory negligence rested on the defendant. *Buechner, et al.* v. *New Orleans*, 112 La. 599, 36, So. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455; same principle, *Palmer* v. *Hoffman*, 63 S. Ct. 477, 87 L. ed. 427.

(2) Defendant being dead, there was as a presumption of "the instinct of self-preservation and * * * the * * *

exercise of due care under the circumstances." (*Aymond* v. *Western U. Tel. Co.*, 151 La. 184, 91 So. 671; same principle, *Baltimore, etc. R. Co.* v. *Landrigan*, 191 U. S. 461, 473, 48 L. ed. 262. "A person is conclusively presumed to act in such a manner as will not unnecessarily expose himself to physical harm." *Lipscomb* v. *Publishing Corp.* (Ct. App., 2d Cir.), 5 So. 2d 45. Possibly this rule may be a little overstated.

(3) Arnold positively stated, as shown by the opinion of the Court (R. 602):

> "It is hard to tell how fast he was driving, but I know he could not have been driving on the shoulder more than ten miles per hour."

(4) Witness Finn swore positively, as quoted in the opinion, there was no visibility (R. 602).

(5) The majority opinion presumed to have Greer and Arnold, truck drivers, establish as a fact, Slade's speed. Greer claimed 20 miles per hour; Arnold, not more than ten. But both Greer and Arnold were directly in the path of the on-coming truck in defendant's fog, unable to see anything other than the approaching lights, and "An estimate made by the occupants of an auto towards which the other car is coming * * * has no probative value * * *." *Mutti* v. *McCall* (Ct. App., 1st Cir.), 130 So. 229, 230; approved, *Stout* v. *Nehi* (Ct. App., 1st Cir.), 146 So. 720, 724; *Campbell* v. *Haas*, 4 La. App. 435.

(6) The photographs transmitted for the most part reflect conditions after Slade's trailer, with its heavy load, had been pulled back from the cabin of the tractor wherein Slade was killed. What changes were thus wrought in the separation nowhere appear.

(7) Upon defendant rested the burden of proving Slade's contributory negligence. The photographs show a single

point of collision between the axles of Greer's overturned truck and the extreme right side of Slade's tractor. Slade's front wheels were slightly cut, but not straightened through the collision. Slade's motor was not driven back into his cab. He was injured not from the front, but from the back. By physics, the mass of the trailer and its load, 16,200 pounds, multiplied by its speed at the time of impact, would equal the work which might potentially be done before that mass was brought to rest. The principle of the lever—the trailer having three fixed points, the pin and its rear wheels,—multiplied at Slade's cabin the damage done, for, with a lever long enough, according to Archimedes, a mouse might move the world. The strength of the materials acted upon and the phenomena of these reactions were not in any wise attempted to be explained by the defendant, who submitted to the jury as factors upon which they could pass, these photographs, and so they did. Now, when the Court of Appeals attempted judicially to find the speed whereat Slade's truck was moving, they entered the field of physics, mechanics and higher mathematics, without adequate factors integrated thereinto by the evidence for any satisfactory answer to be given. This was not a case of a head-on collision, where, as a matter of common experience, the effects would clearly indicate the speed. In this record there is substantially no evidence of injury wrought by direct contact with Greer's truck, but the work was between Slade's tractor and Slade's trailer, whereasto, with deference, the Judges in the Court of Appeals could not possibly find the speed of Slade's truck, for the problem would be in the calculus, if mathematically solvable at all. Defendant, advisedly, did not along scientific lines attempt to make any proof by mechanical engineers. Presumptively this failure was a voluntary choice, indicating probably that if the attempt were made, the result would be adverse to de-

fendant. Had Slade's truck been constructed of a solid body so that the mass could not have moved forward, the force of the impact on Slade's motor was not such as to in any way injure him, at least so the jury could have found and did find, and having so done, there being no countervailing scientific data, the attempt of the Court of Appeals, with deference, was improper, for the answer attempted to be given was impossible of substantiation by evidence.

(8) What speed would have broken the connecting pin does not appear. It might have been that it would have broken—there being no proof thereasto, had Slade been going only one mile per hour, with the same result, but, assume that Slade's speed was absolutely unknown, there is not a line of evidence in this record that would show that the same result would not have occurred had Slade been moving at one mile per hour. The burden was directly upon defendant to show that the excessive speed caused the collapse. *Clisby* v. *M. & O. R. Co.*, 78 Miss. 937, 29 So. 913. Defendant has not in any way shown by any competent evidence that the collapse was due to excessive speed. Also see *O'Pry* v. *Berdon*, et al, (La. Ct. App.) 149 So. 287, 288, "We would not, however, infer that she was driving at an excessive rate of speed just because she was late on that occasion, and independently of any other proof. Cases cannot be decided by such inferences or assumptions.

"We must look to the testimony, facts, and circumstances, if there be any, for the solution of such questions, and cannot indulge in possibilities, probabilities, inferences, or assumptions of that character."

(9) It may well be that as to Slade's speed, the Federal law will control. See Point V herein.

(10) Other factors to be later discussed.

We, therefore, confidently submit that the jury verdict was proper, under the statutes of Louisiana, as construed by its Supreme Court, when the jury found the collapsing of this cab under the impact from the trailer and its load was directly attributable to the fault of Shell Oil Company, Inc., without contributory fault upon Slade's part. Defendant's instructions to the jury were more than liberal. In fact, with deference, our thought is that, with the record in the present shape, Slade's wife and child are entitled to a peremptory charge under the Louisiana law, but, if not, the majority opinion of the Court of Appeals violated clearly Rule 38, clause 5, of this Court by reason of having obviously not followed the law of Louisiana as announced by its Courts, and this opinion, with deference, is in palpable conflict therewith on a most important principle, for, in the Courts of Louisiana, this was a jury question and not one which a bare majority of the Judges could settle as a question of law.

POINT II.

If contributory negligence be a defense, which petitioners deny, the majority opinion in the Court of Appeals, in construing questions of Louisiana law, decided further substantial questions of State law in a way which conflicts with the applicable local decisions. Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487; West v. American Tel. & T. Co., 311 U. S. 223, 85 L. Ed. 139, 144, 132 A. L. R. 956, and note (as to following intermediate court decisions). Six Companies v. Joint Highway District, 311 U. S. 180, 85 L. Ed. 114.

The majority opinion affirmatively disregarded, as therefrom appears, controlling Louisiana decisions, when Slade had been instantly killed and defendant's negligence affirmatively shown, in these particulars:

(a) The burden of proof as to contributory negligence rested on the defendant. *Buechner, et al* v. *New Orleans,* 112 La. 599, 36 So. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455 (frequently approved, compare *Oliphant* v. *Lake Providence,* (Ct. App., 2d Cir.), 193 So. 516-524); *Palmer* v. *Hoffman,* 63 S. Ct. 477, 87 L. ed. 427.

(b) Slade being dead through defendant's wrong, as established by the majority opinion, that opinion disregarded the presumption in Louisiana law adequate to support a verdict from "the instinct of self-preservation and * * * the * * * exercise of due care under the circumstances." *Aymond* v. *Western U. Tel. Co.,* 151 La. 184, 91 So. 671; approved since, same principle, *Baltimore, etc. R. Co.* v. *Landrigan,* 191 U. S. 461, 473, 48 L. ed. 262. "A person is conclusively presumed to act in such a manner as will not unnecessarily expose himself to physical harm." *Lipscomb* v. *Publishing Corp.,* (Ct. App., 2d Cir.), 5 So. 2d 45.

(c) "An estimate made by the occupants of an auto towards which the other car is coming at night * * * has no probative value and usually amounts to a mere guess * * *." *Mutti* v. *McCall* (Ct. App., 1st Cir.), 130 So. 229, 230; approved, *Stout* v. *Nehi,* (Ct. App., 1st Cir.) 146 So. 720, 724; *Campbell* v. *Haas,* 4 La. App. 435.

(d) "Weight and sufficiency" were solely for the jury and not reviewable.

Galloway v. *United States,* No. 553, decided May 24, 1943, 11 Law Week 4395;

Bailey, Administratrix v. *Central Vermont Railway,* No. 640, decided May 24, 1943, 11 Law Week, 404.

With deference, the jury could have found, and, we submit, did find——

(1) That the fog did not begin "at least one-half mile from the place of the accident"; (R., 112)

(2) That Slade could not see the heavy fog; (R., 51)

(3) As shown in the opinion the fog (generated by defendant) at Norco, "When you get into it lies there like a thin coat of ice and the only way you can run through it is to stick your head out of the window."

(4) That moving as Slade was moving was not taking a chance.

The majority opinion lays particular stress upon *Lapeze* v. *O'Keefe,* (Ct. App., Orleans) 158 So. 36, but note——

(a) In the *Lapeze Case,* this was a natural fog wherefor the defendant was in no way responsible.

(b) That the decision was of the Court of Appeals, Orleans, and not by the Supreme Court.

(c) Recovery was allowed to a guest therein.

Frankly, likewise, the Court of Appeals in this connection sought to eliminate the emergency doctrine because of Slade's alleged failure to stop, that Court claiming this doctrine was not applicable (R. 605) "where the emergency is the result of the claimants previous contributory negligence," but, as shown supra, Slade (1) as found by the jury, under controlling Louisiana Supreme Court decisions, was not negligent; and (2) the Shell Oil Company has not produced a single case and, with deference, may not so do, where defendant, as here, has created the artificial fog wrongfully and then sought to use that thus wrongfully created as an excuse for escaping liability. No one may take advantage of his own wrong.

(5) When in following the course of three drivers who preceded him, Slade turned off on the shoulder just as they did, he was acting with due care.

(6) The Court of Appeals said (R. 603) "Slade did not see the truck."

Surely, if he did not see the truck and on account of the density of the fog could not see the truck, it was not contributory negligence to fail to do the impossible.

(7) With deference, there is no undisputed evidence as to the effect of the collision.

We, therefore, submit that in these particulars the Court of Appeals improperly disregarded Louisiana law, and therefor Certiorari should issue.

Point III.

There was the establishment by this opinion in the Fifth Circuit of an erroneous rule, conflicting with rules obtaining in this Court and in the other Circuits, when the Court of Appeals in this cause in the Fifth Circuit, by declaring that certain alleged facts were "without substantial conflict", reversed a jury verdict, when the verdict, as from the opinion affirmatively appeared, was based upon adequate credible evidence.

(a) This opinion clearly violates the Seventh Amendment.

Galloway v. *United States,* No. 553, decided May 24, 1943, 11 Law Week 4395;

Bailey, Administratrix v. *Central Vermont Railway,* No. 640, decided May 24, 1943, 11 Law Week, 404; *Jacob* v. *New York City,* 315 U. S. 752, 86 L. ed. 1166; *De Zon* v. *American President Lines,* 63 S. Ct. 814, 87 L. ed. 768, 775 (Mr. Justice Black's Opinion).

(b) "Weight and credibility are not reviewable" and the attempt in the Fifth Circuit so to do should be stayed.

The proper rule is found in *Morris* v. *Sells-Floto Circus, Inc.,* 4 Cir., 65 Fed. 2d 782. *Payne* v. *Colvin,* 7 Cir., 276

Fed. 15; Precisely this occurred in *Conway* v. *O'Brien,* 312 U. S. 492, 85 L. ed. 969. We concede that a review on Certiorari is not a matter of right but of sound judicial discretion, Rule 38, Clause 5, but under (b) thereof, when a Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings" this power is appropriate. *Conway* v. *O'Brien,* supra; (compare *Surgan* v. *Parker,* 181 So. 86, 89, Ct. of App. La.); *Tiller* v. *Atlantic Coast Line,* 63 S. Ct. 444, 87 L. ed. 453, reversing the Court of Appeals of the 5th Circuit, 128 Fed. 2d 420; *Halliday* v. *United States,* 315 U. S. 94, 86 L. ed. 711.

In the leading case of *Richmond & Danville R. R. Co.* v. *Powers,* 149 U. S. 43, 45, this Court said:

> "It is well settled that where there is uncertainty as to the existence of either negligence, or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

As hereinbefore shown, there was here before the jury both (a) a conflict in the evidence, and (b) in the conclusions that might be therefrom drawn, and notwithstanding this affirmatively appears from the opinion of the majority of the Federal Court of Appeals itself, that Court assumed judicially to determine a question of contributory negligence.

Compare *Kreigh* v. *Westinghouse, etc. Co.,* 214 U. S. 249, 253, 258, "Weight and credibility are not reviewable", and when, contrary to the Constitution, the Court of Appeals of the Fifth Circuit disregarded controlling presumptions and misconceived Slade's rights to the extent above shown, then rectification for his widow and child is here their right.

Point IV.

Contributory negligence not a defense for liability arising from an absolute nuisance, and when the Court of Appeals precluded petitioners from relying upon this rule on remand, an important question of Federal law was assumed to be settled in an improper manner, whereasto rectification should be had here.

Under Rule 8, District Court Rules, plaintiff stated all facts in Count One, and thereon demanded judgment for $50,000, the injuria being (a) negligence, (b) absolute nuisance, and (c) wilful or wanton negligence. Plaintiff likewise added Count Two, reaverring facts by reference, and therein counted upon legal liability arising from nuisance alone. The District Judge directed a verdict for defendant on the Second Count for want of evidence to show the alleged nuisance, but submitted the cause on Count One to the jury, who found for the plaintiff. Plaintiff did not appeal from the direction of the verdict as to Count Two. Thereafter, the Court of Appeals reversed solely on the ground of alleged contributory negligence, and remanded for a new trial, wherein plaintiff is to be precluded from recovery by contributory negligence, though the legal liability may be predicated upon an absolute nuisance or under probable wilfulness or wantonness. *Evens* v. *Texas, etc. R.*, 5 Cir., 134 Fed. 2d, 275.

Therein, the Court of Appeals seriously erred, when the evidence clearly showed this liability, and should have remanded the case for a trial on all of the facts, giving plaintiff the right to recover under the facts, as pleaded and as proved, it being obvious that the creation and maintenance of an impenetrable fog is an absolute nuisance when committed on a transcontinental highway for many years.

After an elaborate trial, the jury having found for plain-

tiff as to the creation and maintenance of the fog, its existence is a factor that may not be disregarded, notwithstanding the District Judge (R., 531) said:

> "The second count is predicated upon the theory * * * (of) a nuisance there at Norco and as to the second count, I instruct you that you return a verdict for the defendant * * * *for the reason that there is no evidence of any such nuisance* * * * but the case will be submitted to you to determine the issues of whether or not the defendant was guilty of negligence in creating an artificial fog * * * whether or not that was the proximate cause of the death of the deceased."

Under Rule 8, facts were stated. Under that pleading, the evidence was introduced, competently showing the creation and maintenance of the fog on the public highway—of this there can be no doubt—and thereupon, as to the creation and maintenance of the fog, the jury found for plaintiff. Having so found, the creation and maintenance of the fog, as claimed and returned a verdict for plaintiff on the ground of creation and maintenance of the fog, plaintiffs did not appeal from the judgment in their own favor for the reason that, at the hands of the jury, they had received a verdict awarding full compensation for the wrongful creation and maintenance of the fog.

Now, under the law, if this wrong were an absolute nuisance, defendant could not escape on the ground of contributory negligence.

As said in 39 *Am. Juris.*, 475:

> "The cases are in substantial agreement that the ordinary rule of contributory negligence, which defeats recovery altogether in actions based on negligence as distinguished from nuisance, does not apply in case of an absolute nuisance. This view does not preclude the defendant from preventing or reducing recovery by showing that the damages sustained by the plaintiff were due, in whole or in part, to his own acts or con-

duct, or from defeating the action if the plaintiff and the defendant were joint wrongdoers, acting in concert, and not independently. But it has been held that where a nuisance causing a personal injury is not grounded on negligence, but is absolute, the fault on the part of the plaintiff which will bar recovery is fault so extreme as to be equivalent to invitation of injury, or, at least, indifference to consequences."

See *Hoffman* v. *Bristol,* 113 Conn. 386, 155 A. 499, 75 A. L. R. 1191, and, especially, the opinion of Judge Cardoza of the Court of Appeals, in *McFarlane* v. *Niagara Falls,* 247 N. Y. 340, 348, 160 N. E. 391, 393, 57 A. L. R. 16, wherein, for an absolute nuisance, liability should be unconditionally imposed.

That done by the revised rules was the elimination of technicalities and the establishment of absolute justice sofar as potentially possible. This precise question has not in this aspect been adversely decided by the Louisiana Courts, though there are decisions therein where this question was not raised, whereunder liability has been imposed as for negligence. This is a case of the first impression. An abutting owner, without excuse, absolutely blocks the Federal highway with an impenetrable fog. The issue here is, when defendant has so done and thus breached its absolute obligation, may it be relieved of responsibility, when plaintiff's sole default, if default it be, is attributable to an inability directly created by defendant's wrong? When plaintiff has such a right, did Rule 8 preclude plaintiff's reliance thereon, upon remand, when the jury, the District Judge and the Court of Appeals, all alike, held defendant guilty of creating and maintaining the fog upon the public highway? When defendant appealed from liability imposed by reason of the creation and maintenance of the fog, that Court should have remanded so as that plaintiff could have recovered upon the facts proved. Appeal by defendant from this part of the judgment should have that effect.

3 Am. Juris., 701, "Appeal & Error", Section 1195. Obviously, Slade will not have died in vain if by his death he can establish protection against such wrongful acts done by abutting owners.

POINT V.

Recovery for the wrongful death of a truck driver fully complying with I. C. C. safety rules for motor carriers may not be denied under State law.

Under the Constitution, power over commerce between the several states, was vested in Congress.

Upon the 27th day of May, A. D., 1939, the Interstate Commerce Commission, at its office, in Ex Parte No. MC-4, acting under the authority of the Motor Carriers' Act of 1935, 49 Revised Stat., 543, 49 U. S. C. A., Section 304 (a) (1) and (2), with respect to qualifications and maximum hours of service of employes, and safety of operation and equipment, of common carriers and contract carriers by motor vehicle in interstate commerce, prescribed Safety Regulations, whereof judicial notice will be taken.

The Court of Appeals properly found these rules applicable, referring to Rule 2.31 in the opinion, whereby it is provided:

> "Extreme caution in the operation of motor vehicles shall be exercised under hazardous conditions such as snow, ice, sleet, fog, mist, rain, dust, smoke or any other condition which adversely affects visibility or traction, and speed shall be reduced accordingly,"

but the jury found Slade had properly complied therewith, and, with deference, the Court of Appeals could not reverse therefor, as above shown, and committed fundamental error when it reversed by reason of its conception of the Louisiana law, the judgment rendered by the District Court upon the jury's verdict. Under the Federal law, Slade, as the

jury found, had done his full duty. Having so thus done, could his widow and child have from them taken, assuming the State law to be as held by the majority opinion, the right to recover, which was vouchsafed to Slade upon his compliance with the due care prescribed by the Interstate Commerce Commission.

Compare *Terminal R. Asso.* v. *Brotherhood,* 63 S. Ct. 420, 87 L. Ed. 371, wherein it is indicated that had the Interstate Commerce Commission acted as they have here, then Slade's rights would have been founded thereon, this being, under the Constitution, the supreme law of the land. Compare *Illinois Com. Com'n* v. *Thompson,* 63 S. Ct. 834, 87 L. Ed. 783; *New York C. R. Co.* v. *Winfield,* 244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045; *New York Central R. Co.* v. *White,* 243 U. S. 188, 378 Ct. 247, 61 L. Ed. 667.

In *Brannon* v. *Rickenbacher Transp., Inc.,* 43 Fed. Supp. 893, the District Judge held that such an employe was not within the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, 53 Revised Stat. 1404.

Under the Motor Carrier's Act, 49 Stat. at Large, 543, 49 U. S. C. A. Sec. 301, it was held that under *State ex Rel* v. *Kelly,* 192 Wash. 394, 74 Pac. (2d) 16, there was no regulation of employes engaged in interstate commerce, and hence the State Workmen's Compensation Act controlled, but as remarked in note, 83 L. Ed. 1179:

> "In other cases, however, which hold that the Federal act does not divest an employee of his rights under state compensation acts with respect to injuries received before the enactment of the Federal act, the inference seems to be that as to injuries occurring after its effective date the Federal Motor Carrier Act operates to oust the state compensation boards of their jurisdiction over employees engaged in interstate motor transportation. Ben Wolf Truck Lines *v.* Bailey (1936) 102 Ind. App. 208, 1 N. E. (2d) 660; Hartzfeld *v.* Block

(1937) 127 Pa. Super Ct. 323, 193 A. 386; Buckingham Transp. Co. *v.* Industrial Commission (1937) 93 Utah, 342, 72 P. (2d) 1077, supra, under heading 'Retroactive nature.' "

Note Rule 2.01:

(R. 81) "Every motor carrier and his or its officers, agents, employees, and representatives concerned with the transportation of persons or property by motor vehicle shall comply with the following regulations and shall become conversant therewith."

Note Rule 2.061:

(R. 81) "No motor vehicle shall be driven at a speed greater than is reasonable and prudent, having due regard to weather, traffic, intersections, width and character of the roadway, type of motor vehicle, and any other conditions then existing."

As to State speed limits, see Rule 2.062.
By Rule 2.11:

"Every motor vehicle shall be driven as far to the right side of the traveled portion of the highway as is practicable."

Rule 2.22 provides:

(R. 82) "No motor vehicle shall be stopped, parked, or left standing, whether attended or unattended, upon the traveled portion of any highway outside of a business or residence district, when it is practicable to stop, park, or leave the motor vehicle off the traveled portion of such highway. * * *"

As counsel understands Slade's action, he was attempting to comply with these safety rules, which he assumed to require that he should turn off of the paved portion on to this shoulder when slowing down to leave the traveled por-

tion of the highway clear. If this be, as we insist it was, the proper thing to have done under these safety rules, then, when the Court of Appeals sought to take from Slade's widow the right to recover by integrating the Louisiana law as in conflict with Slade's right, which, with deference, it was not, then to the extent that Slade complied with the requirements of the Interstate Commerce Commission, the State of Louisiana could not say that he had done wrong and preclude Mrs. Slade from recovering when that by him done accorded with the Federal requirements. The State of Louisiana may only act when the Interstate Commerce Commission has not acted. There were four trucks moving in interstate commerce. The truck of Greer that overturned was so moving, and this truck by so thus overturning brought about the collapse of Slade's cab, and when the Interstate Commerce Commission has said what these interstate truck drivers must do, the State of Louisiana may not require those truck drivers to do any other or different thing.

Compare *McCullough* v. *Maryland*, 4 Wheat. 427; *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Brown* v. *Maryland*, 12 Wheat. 420, 6 L. Ed. 678. Compare *Federal Power Com'n* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 86 L. Ed. 1037; *Illinois Natural Gas Co.* v. *Central Ill. Pipe Serv. Co.*, 314 U. S. 498, 86 L. Ed. 371; *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572, 86 L. Ed. 1682.

With deference, as above shown, the majority opinion of the Court of Appeals incorrectly assumes to overturn the verdict of the jury which had found compliance with these safety rules of the Interstate Commerce Commission, and having found that thereunder Slade was not guilty of fault that would preclude, the Court of Appeals could not give effect to a rule of law establishing by the State of

Louisiana in conflict with that established by the Interstate Commerce Commission to take from Slade that to Slade given under the Interstate Commerce Commission's rules.

Further, compare 42 Stat. 216, 23 U. S. C. A., Sec. 19, whereunder the Secretary of Agriculture was likewise given certain authority as to rules, to insure "the safety of traffic thereon."

Accordingly, we have here a case of outstanding importance of first impression involving the safety of truck drivers moving in interstate commerce over interstate Federal highways, wherefor Certificates of Convenience and Necessity have properly issued, and where labor conditions and equipment have been extensively regulated, and exclusively the Interstate Commerce Commission prescribed how these interstate truck drivers shall drive when so thus traveling in interstate commerce.

So that, when the Court of Appeals subordinated these paramount rules to Louisiana law by reason of assumed conflict which the Court of Appeals found therein, it wrongfully violated thereby the commerce clause and raised a question of that character which this Court should review, being of paramount public importance.

Conclusion.

It may be, as was done in *Conway* v. *O'Brien*, 312 U. S. 492, 85 L. Ed. 969, that the Court will not need to determine this question as to Interstate Commerce if they find, as find they should, that under the law of Louisiana, which was obligatory upon the Court of Appeals, Slade did not defeat his right of recovery by that by him done or left undone. There is also this other outstanding important question under Rule 8, whereby fundamental wrong will be wrought unless rectification is here had.

The writ should be issued upon every ground prescribed, with deference, in Rule 38, paragraph 5 (b) of the Supreme Court.

Respectfully,

MARCELLUS GREEN,
ROSS R. BARNETT,
P. Z. JONES,
GARNER W. GREEN,
Counsel for Petitioners.

FRANK F. MIZE,
Forest, Miss.;
GREEN & GREEN,
Jackson, Miss.;
BARNETT, BARNETT, JONES & STONE,
Jackson, Miss.,
Of Counsel.